11-14-2001

Seventh Place: John Ashcroft, et al. v. Free Speech Coalition, et al.

Jesse Adams

Jeffery Goldman

SEVENTH PLACE

No. 00-795

In the

SUPREME COURT OF THE UNITED STATES

March Term, 2002

John Ashcroft, et al.,

Petitioners,

- against-

The Free Speech Coalition, et al.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS

Nov. 14
~~October 18~~, 2001
Round #2 7:45 P.M.

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QUESTIONS PRESENTED

1. Did the Ninth Circuit properly hold that the Child Pornography and Prevention Act of 1996 ("CPPA") is a content-based restriction of speech because it singles out and bans an entire type of speech?

2. Did the Ninth Circuit properly hold that the CPPA is subject to strict scrutiny and unconstitutional because it is not narrowly tailored to serve a compelling governmental interest?

3. Did The Ninth Circuit properly hold that the CPPA is unconstitutional because it is overbroad in its prohibition of material that has been accorded first amendment protection?

4. Did the Ninth Circuit Properly hold that the CPPA is vague and thus unconstitutional because it fails to provide adequate notice and encourages arbitrary enforcement of the law?

5. Does the affirmative defense provided in the CPPA prevent overbroad application and support a compelling interest claimed by Congress?

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BRIEF FOR THE RESPONDENTS

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Free Speech Coalition, respectfully submit this brief and request that this Court AFFIRM the judgment of the United States Court of Appeals for the Ninth Circuit and permanently enjoin enforcement of the provisions of the Child Pornography Prevention Act of 1996 which criminalize the production, distribution and presentation of non-obscene materials featuring performances by adults who "appear to be minors" as well as performances that "convey the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." The Child Pornography Prevention Act of 1996 is unconstitutional as

a result of its impermissible infringement of fundamental rights guaranteed by the First and Fifth Amendment of the United States Constitution.

STANDARD OF REVIEW

A challenge to the constitutionality of a federal statute is reviewed de novo. See Crawford v. Lungren, 96 F.3d 380, 384 (9th Cir. 1996).

STATEMENT OF THE CASE

Preliminary Statement

On January 27, 1997, Free Speech Coalition, on its own behalf and on behalf of its members, Bold Type, Inc., Jim Gingerich, and Ron Raffaelli ("Respondents") filed their complaint against John Ashcroft, Attorney General of the United States, and the United States Department of Justice ("Petitioners") for declaratory and injunctive relief, by a pre-enforcement challenge, seeking to permanently enjoin enforcement of certain provisions of the Child Pornography Prevention Act of 1996 ("CPPA"). (J.A. 1.) Petitioners alleged that the CPPA criminalizes the production, distribution and presentation of non-obscene materials featuring performances by adults who "appear to be minors" as well as performances that "convey the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." (J.A. 1-2.) Petitioners further alleged that the CPPA's failure to define certain terms and phrases crucial to its enforcement renders it unconstitutionally vague and that its failure to provide clear guidelines on what materials are prohibited create an unconstitutional prior restraint on constitutionally-protected forms of expression. (J.A. 6-7.)

On August 12, 1997, the United District Court granted Respondents' motion for summary judgment and denied Petitioners' motion for summary judgment by finding that the CPPA meets constitutional standards as is constitutional as written. (J.A. 85-86.)

On August 13, 1997, Petitioners filed their notice of appeal from the District Court's decision and judgment. (J.A. 87-90.)

On December 17, 1999, the Ninth Circuit reversed the District Court's judgment, holding that the CPPA's definition of the phrases "appears to be" a minor, and "conveys the impression" that the depiction portrays a minor, are vague and overbroad and do not meet the requirements of the First Amendment. Free Speech Coalition v. Janet Reno,198 F.3d 1083, 1097 (9th Cir. 1999).

On November 16, 2000, Petitioners filed a Writ of Certiorari in the Supreme Court of the United States. (J.A. 114.)

On January 22, 2001, this Court granted Certiorari. (J.A. 117-18.)

Statement of Facts

Respondent Free Speech Coalition is a trade association, representing more than six hundred businesses and individuals involved in the production, distribution, sale and presentation of non-obscene, adult-oriented materials. (J.A. 2-3.) It was formed in 1991 to assist its members in the exercise of their First Amendment rights and in the defense of those rights against censorship. (J.A. 2-3.) Respondent Bold Type, Inc. a publishing corporation, Respondent Jim Gingerich an artist, and Respondent Ron Raffaelli, a professional photographer join Free Speech Coalition in this action (J.A. 3.) Respondents do not advocate or tolerate the production or distribution of child pornography and have assisted in the eradication of such materials. (J.A. 3.)

The CPPA is Congress' latest attempt to fix the deficiencies that have been evident since its first legislative enactment in this area in 1997. Free Speech Coalition, 198 F.3d at 1087. The original federal legislation specifically prohibiting the sexual exploitation of children has been

amended multiple times since it was enacted as the Protection of Children Against Sexual Exploitation Act of 1977. Free Speech Coalition, 198 F.3d at 1087. The Act had its problems in that only one person was convicted under the Act's prohibited production of minor engaging in sexually explicit conduct. Id. As a consequence of the law's deficiencies, Congress enacted the Child Protection Act of 1984 which did away with obscenity requirement under Miller v. California, 413 U.S. 15 (1973), and raised the age limit of the minor(s) used in the production from 16 years old to 18 years old. Free Speech Coalition, 198 F.3d at 1088. Again, Congress did not get the results it had hoped for and in 1986 amended the law once again to ban the advertisement of child pornography by passing the Child Abuse Victims Rights Act of 1986. Id. In 1988, Congress then passed the Child Protection and Obscenity Enforcement Act of 1988 which made it unlawful to use a computer to transport, distribute, or receive child pornography. Id. In 1990, and again in 1994, Congress once again amended the law to hopefully repair earlier deficiencies. Id. Then in 1996, as a consequence of repeated failures and shortcomings in its attempt to provide proper constitutional legislation to combat the sexual exploitation of children, Congress enacted the Child Pornography Protection Act of 1996 on or about September 30, 1996. (J.A. 3.) The CPPA, like its predecessors, is a continuation of Congress's failure to achieve its goal as it infringes on the constitutionally protected rights of adults. The CPPA goes way beyond Congress' earlier attempts by including expression that is constitutionally protected.

Although Respondents are adamantly opposed to child pornography and do not seek to interfere with the government's efforts to combat the sexual exploitation of children, this lawsuit was filed as a pre-enforcement challenge in order to avoid the possible prosecution and incarceration of individuals who engage in constitutionally protected speech. (J.A. 3.)

SUMMARY OF ARGUMENT

The CPPA is unconstitutional because it violates the First and Fifth Amendments of the Constitution. The CPPA is a content-based restriction of speech and is therefore subject to strict scrutiny. The CPPA is not narrowly tailored to serve a compelling governmental interest. The government has no compelling interest in banning non-obscene materials that do not depict actual minors. The government has no compelling interest in banning the dissemination of pornographic images because they may whet the appetites of pedophiles, nor because the material may be morally or aesthetically repugnant. The only compelling interest the government has is the protection of the physical and psychological well-being of actual children, and the CPPA is not narrowly tailored to serve that interest.

The CPPA is unconstitutionally overbroad because it not only impermissibly suppresses material that is protected under the First Amendment but it bans a wide array of non-obscene material that has serious literary, artistic, political and scientific value. Further, the affirmative defense provided does not protect individuals from its overbroad application. The CPPA is also unconstitutionally vague because it fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits and it allows arbitrary and discriminatory enforcement by police, judges and juries.

ARGUMENT

I. THE CHILD PORNOGRAPHY ACT OF 1996 IS A CONTENT-BASED RESTRICTION OF SPEECH BECAUSE IT SINGLES OUT AND BANS AN ENTIRE TYPE OF SPEECH.

"The 'principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it

conveys.'" Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642 (1994) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." Crawford v. Lungren, 96 F.3d 380, 384 (9th Cir. 1996). Put slightly differently, this Court has also said that "any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it." Boos v. Barry, 485 U.S. 312, 335-36 (1988) (Brennan, J., concurring).

The First, Fourth, Fifth, Ninth and Eleventh Circuits have all determined that the Child Pornography Act of 1996 is a content-based restriction on speech. United States v. Hilton, 167 F.3d 61, 69 (1st Cir. 1999); United States v. Mento, 231 F.3d 912, 918 (4th Cir. 2000); United States v. Fox, 248 F.3d 394, 400 (5th Cir. 2001); Free Speech Coalition v. Janet Reno, 198 F.3d 1083, 1090-91 (9th Cir. 1991); United States v. Acheson, 195 F.3d 645, 650 (11th Cir. 1999). The First Circuit stated that the CPPA "fails both tests for substantive neutrality: it expressly aims to curb a particular category of expression (child pornography) by singling out that type of expression and banning it. Blanket suppression of an entire type of speech is by its very nature a content-discriminating act." Hilton, 167 F.3d at 68. The Ninth Circuit similarly stated that "the Hilton court's determination that blanket suppression of an entire type of speech is a content-discriminating act is a legal conclusion with which we agree. The child pornography law is at its essence founded upon content-based classification of speech." Free Speech Coalition, 198 F.3d at 1090-91.

The CPPA is irrefutably a content-based statute under every definition issued by this Court and those subsequently expounded by the circuit courts. The statute bans, in part, "any visual depiction . . . of explicit sexual conduct" where such visual depiction "is or appears to be,

of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8) (1996). In order to determine whether a violation of the statue has taken place, the content of the image must be scrutinized. Such scrutinizing illustrates the very essence of a content-based statute: it is aimed at the communicative impact of the speech. The CPPA does not merely restrict the time, place or manner of speech. Instead, it constitutes a total ban on certain types of disfavored speech. Hilton, 167 F.3d at 69.

II. THE CPPA IS SUBJECT TO STRICT SCRUTINY AND IS UNCONSTITUTIONAL BECAUSE IT IS NOT NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST.

When a statute is content-based, it is presumed to be unconstitutional. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). In order to defeat this presumption, the government must establish that it is regulating the content of the speech in order to promote a compelling interest and that it has chosen the least restrictive means to further the articulated interest. Boos, 485 U.S. at 321, 329. According to the government, the CPPA was designed to address three compelling interests. Free Speech Coalition, 198 F.3d at 1091. First, that child pornography "requires the participation of actual children in sexually explicit situations to create the images." Id. Secondly, that the "dissemination of such pornographic images may encourage more sexual abuse of children because it whets the appetite of pedophiles." Id. Lastly, "that such images are morally and aesthetically repugnant." Id. at 1092. The Ninth Circuit concluded that Congress "has not provided a compelling interest" and thus did "not address the 'narrow tailoring' requirement." Id. at 1095.

A. The State Has No Compelling Interest In Banning Non-Obscene Materials That Do Not Depict Actual Minors.

It is well settled law that the protection of minors used in the production of child pornography is a compelling interest of the federal government. New York v. Ferber, 458 U.S. 747, 756-57 (1982). A state's "interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" Id. (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)). The problem, however, is that the language of the CPPA can criminalize the use of fictional images that involve no human being. Free Speech Coalition, 198 F.3d at 1092. "Images that are, or can be, entirely the product of the mind are criminalized." Id. In addition, the court noted that the constitutionality of a definition including phrases such as "appears to be" and "conveys the impression" is not supported by existing case law." Id. The Ninth Circuit aptly observed that "nothing in Ferber can be said to justify the regulation of such materials other than the protection of actual children used in the production of child pornography." Id.

1. The CPPA goes beyond the compelling interest of protecting real children.

While the protection of real children is a compelling interest, the CPPA goes beyond that interest. Child pornography is defined as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct . . . ."
18 U.S.C. § 2256(8). Accordingly, a computer-generated image or picture need not involve a real person whatsoever. This Court has stated before that materials or depictions of sexual conduct "which do not involve live performance or photographic or other visual reproduction of live performances, [retain] First Amendment protection." Ferber, 458 U.S. at 765. The Ninth Circuit recognized that the CPPA is a significant departure from Ferber in that "the language of

the statute criminalizes even those materials that do not involve a recognizable minor." Free Speech Coalition, 198 F.3d at 1092. Therefore, the CPPA goes beyond the compelling interest articulated by the government by making criminal activities protected by the First Amendment, namely, free expression not involving the use of real minors.

2. Banning the dissemination of pornographic images because they may whet the appetites of pedophiles is not a compelling interest.

The second "compelling" interest advanced by the government before the Ninth Circuit was that "dissemination of [such] pornographic images may encourage more sexual abuse of children because it whets the appetite of pedophiles." Free Speech Coalition, 198 F.3d at 1091. While the government contends that this is a "secondary effect" of child pornography that justifies a restriction on protected speech, their argument is based on a fundamental misconception of the so-called secondary effects doctrine.

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986), sets forth the "secondary effects" doctrine upon which the government relies. In Renton, a zoning ordinance enacted by the city of Renton, Washington, prohibited adult motion picture theatres from locating within 1,000 feet of "any residential zone, single- or multiple-family dwelling, church, park or school." Id. at 43. There, the City explained that such businesses "would have a severe impact upon surrounding businesses and residences." Id. at 42. Although the Court recognized that the statute was indeed content-based, and not a neutral time, place or manner restriction, it recognized that a city's "'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" Id. at 39 (quoting Young v. American Mini Theatres, 427 U.S. 50, 71 (1976)). More specifically, the concerns were the effects of crime and diminished property values. Id. at 48. Because the statute in Renton only regulated secondary effects, strict scrutiny was not applied and this Court held that the "appropriate inquiry in [this] case, then, is

whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." Renton, 475 U.S. at 39. The Court concluded that "it is clear that the ordinance meets such a standard." Id.

The government fundamentally misconceives of the notion of secondary effects in contending that the CPPA is designed to eliminate them. In Renton, the adult motion picture theatres were thought to have a harmful effect on the surrounding neighborhoods, not on the patrons or viewers of the films themselves. Diminished property values, an increase in crime rates, and a less secure retail trade - the "secondary effects" with which the Renton Court was concerned, are unrelated to the message of the adult films. If Renton had held that the secondary effect of adult motion picture theatres was the creation of potential sex crimes, the government's argument in this case, that the viewing of images whets the appetites of pedophiles, would be analogous. Instead, it is an unwarranted twisting of existing law. The government is cloaking a "primary" effect of the viewing of such images in the secondary effects language of Renton in an effort to change fundamental American jurisprudence. Furthermore, this Court has already clarified that if the ordinance at issue in Renton had been justified "by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate." Boos v. Barry, 485 U.S. 312, 321 (1988).

Over fifty years ago, this Court stated that the "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." Stanley v. Georgia, 394 U.S. 557, 564 (1969). The fact that these ideas may whet the appetites of any one group or another is simply constitutionally irrelevant. "[The] assertion that the State has the right to control the moral content of a person's thoughts . . . may be a noble purpose, but it is wholly

inconsistent with the philosophy of the First Amendment." Stanley, 394 U.S. at 565-66. "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." Id. at 566.

Here, if the government is worried that the dissemination of images that do not involve the use of real children will cause further harm to children, the appropriate remedy is certainly not the restriction of free expression. It is established law that if the state is concerned about printed or filmed materials inducing antisocial conduct, "among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law." Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). The attempt to preempt antisocial conduct through the restriction of free expression of ideas is inimical to a free society. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley, 394 U.S. at 565. If the government here is allowed to deter the exploitation of real children that occurs in the production of child pornography by banning fictional images that might induce such exploitation, the same arguments can later be made for a myriad of social ills. Literature on guerilla warfare and terrorism will be banned because it may whet the appetites of potential terrorists; Mien Kampf will be banned as it could whet the appetites of racial supremacists; and, perhaps even Playboy will be banned as it whets the appetites of potential sexual predators.

The Ninth Circuit stated in Crawford that "listeners' reactions to speech are not the type of 'secondary effects' [we] referred to in Renton" and that "regulations that focus on the direct impact of speech on its audience present a different situation." 96 F.3d at 385. The statute in question there was "concerned with psychological damage to readers and, therefore, 'targets the

direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech." Crawford, 96 F.3d at 385 (quoting Boos, 485 U.S. at 321).

Here, the government has not pointed to one true secondary effect that is a result of viewing images that "appear to be" of a minor engaged in sexually explicit conduct; it has pointed only to primary effects. The Ninth Circuit refused to accept the government's secondary effects argument. Free Speech Coalition, 198 F.3d at 1083. The regulation or prohibition of images that produce primary effects upon their viewers is nothing less than thought control. See Boos, 485 U.S. at 321. If the government is frustrated in its efforts to stop the business of child pornography, Respondents urge that this Court not lessen their burden by sanctioning thought control in a new and frightening manner. To do so would indeed require a fundamental shift in First Amendment jurisprudence. Free Speech Coalition, 198 F.3d at 1094-95.

American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323, 324-25 (7th Cir. 1985), dealt with a similar attempt by the government to alter social behavior through the dissemination of ideas inimical to some, if not most, of the general population. In Hudnut, the city of Indianapolis enacted an ordinance "defining 'pornography' as a practice that discriminates against women." Id. at 324. "Pornography," under the ordinance, was defined as "the graphic sexually explicit subordination of women, whether in pictures or in words . . ." Id. The Court immediately countered with the assertion that "the state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents." Id. at 325. The central theme of the case was that the ordinance was an attempt at thought control. In striking down the statute, the court in Hudnut reasoned that "[s]peech that 'subordinates women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in 'positions of servility or submission or display' is

forbidden, no matter how great the political value of the work taken as a whole." Hudnut, 771 F.2d at 328. Just as in the case before this Court today, the city of Indianapolis "justifie[d] the ordinance on the ground that pornography affects thoughts." Id. In Free Speech Coalition the Ninth Circuit stated that "if the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech." 198 F.3d at 1093. This simply has never been, and ought never to be, a compelling state interest. To declare it so today would erode over two centuries of First Amendment jurisprudence. To do so would require a "remarkable shift" in the First Amendment paradigm. Id. at 1094-95. It would, in effect, turn First Amendment jurisprudence "on its head." Id.

3. Banning material that may be morally or aesthetically repugnant is not a compelling Interest.

The third compelling interest advanced by the government is that "such images are morally and aesthetically repugnant." Free Speech Coalition, 198 F.3d at 1092. In Ferber, this Court stated that "the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*." 458 U.S. at 763. Yet, this case is distinguishable from the statement made by Justice White in Ferber. "De minimis" social value is not a proxy for speech unprotected by the First Amendment, it is merely a normative judgment. There are many who would argue that Lolita, Nabokov's famous literary work, has substantially more than a "de minimis" social value. In fact, however, there are hundreds of gainfully employed professors across the country who assert that Nabokov's work has great literary, artistic or social value. If the CPPA were drafted to include not only visual, but literary depictions, then perhaps Lolita would be outlawed as well, since it too may be "morally and aesthetically repugnant." In fact, the Ferber court even suggested using young-

looking adults or simulations as constitutionally protected alternatives to the use of actual children. Ferber, 458 U.S. at 763.

B. The CPPA Is Not Narrowly Tailored To Serve A Compelling Governmental Interest And Fails Strict Scrutiny Because It Is Overinclusive.

The Ninth Circuit concluded that because Congress had not provided a compelling interest, they did not have to address the narrowly tailoring requirement. Free Speech Coalition, 198 F.3d at 1095. Assuming, however, that there is a compelling interest here, it can only be the protection of real children, but the statute is not narrowly tailored to serve that interest. The scrutiny to be applied to a content-based restriction of speech is that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Education Assn. v. Perry Local Educators Assn., 460 U.S. 37, 45 (1983).

Here, the CPPA as drafted criminalizes conduct that is unrelated to the compelling interest of protecting the physical and psychological well-being of children. It is in this sense that the statute is not narrowly tailored. It criminalizes the possession of images that appear to be minors but are not, on the assumption that technology has advanced so much that it is the only effective way to combat harm to real children. (J.A. 38-39.) Advancing technology should not be a trump card in our courts. If it were, the role of precedent would be virtually nil today since technology is so rapidly changing our entire society and the issues before our courts. Furthermore, there is no demonstrable link between computer generated images that appear to be minors and harm to actual children. As the Ninth Circuit concluded, "factual studies that establish the link between computer-generated child pornography and the subsequent sexual abuse of children apparently do not yet exist." Free Speech Coalition, 198 F.3d at 1093. In fact, the justification for the proposition that there is a causal link between such images and harm to actual children came from congressional reliance on a report prepared by the Attorney General's

Commission on Pornography, a report that predates the technology at issue here. Free Speech Coalition, 198 F.3d at 1093. So, a belief in this nexus requires a leap of faith, and in the context of the First Amendment, such a leap is inappropriate.

The government also suggests that the only images that will be prosecuted under the CPPA are those that are "virtually indistinguishable" from minors. (J.A. 44.) This is because that phrase makes an appearance in the legislative history. If that is what Congress meant to combat, they should have used the more narrow and precise language, not the phrase "appears to be." District attorneys are simply not bound by legislative history, and are even less likely to be intimately familiar with it. In the context of constitutionally protected speech, it is not proper for the government to contend that an alternative definition buried in the legislative history vindicates the use of broad language in the actual statute. Whether an image which is virtually indistinguishable from an actual minor is worthy of First Amendment protection is not an issue today, but it is conceivable that even this narrower definition does not fall outside the realm of speech afforded constitutional protection.

C. Without Proven And Substantial Evidence, The Court Need Not Give Deference To Congressional Findings.

In the realm of First Amendment questions, Congress must base its conclusions upon substantial evidence. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 822 (2000). Given the deference due a co-equal and representative branch of government, a court is not to lightly second guess legislative judgments. United States v. Pearl, 89 F. Supp. 2d 1237, 1239 (D. Utah 2000). However, an act of Congress should be invalidated for compelling constitutional reasons. Id. There is no more compelling reason than protecting the right of free expression that is afforded citizens under the First Amendment of the United States Constitution.

Congress has failed to substantially prove that viewing child pornographic material will result in increased activity of pedophilias. Without this, Congress fails to prove they have a compelling interest in preventing such expression.

It has long been accepted that unless speech incites immediate and direct harm, it does not fall outside protection of the First Amendment simply because it is found offensive by some or affects the thoughts of others. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).

In Brandenburg, a leader in the Ku Klux Klan made a speech at a Klan rally and was later convicted under an Ohio criminal syndicalism law. Id. at 445-46. The law made illegal advocating "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," as well as assembling "with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Id.

This Court held that the Ohio law violated Brandenburg's right to free speech. Id. at 448. This Court used a two-pronged test to evaluate the nature of speech: (1) speech can be prohibited if it is "directed at inciting or producing imminent lawless action" and (2) it is "likely to incite or produce such action." Id. at 447. The criminal syndicalism act made illegal the advocacy and teaching of doctrines while ignoring whether or not that advocacy and teaching would actually incite imminent lawless action. Id. at 448. The failure to make this distinction rendered the law overly broad and in violation of the Constitution. Id.

Without proving with substantial evidence the link between viewing child pornography and actions by pedophiles, Congress has not shown a compelling interest in protecting minors against the presumed effects of non-obscene sexual materials that do not depict actual minors, any more than it has a compelling interest in proscribing the effects of violent speech.

III. THE NINTH CIRCUIT PROPERLY HELD THAT THE CPPA IS UNCONSTITUTIONAL BECAUSE IT IS OVERBROAD IN ITS PROHIBITION OF MATERIAL THAT HAS BEEN ACCORDED FIRST AMENDMENT PROTECTION.

The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U. S. 601, 612-15 (1973). The CPPA is overbroad because it impermissibly suppresses material that is protected under the First Amendment by defining child pornography to include visual depictions of adults that "appear to be minors." 18 U.S.C. § 2256(8)(B). Furthermore, the CPPA is overbroad because it bans a wide array of non-obscene material that has serious literary, artistic, political and scientific value.

In Broadrick, Oklahoma prohibited its civil servants from soliciting funds from political candidates and exhibiting bumper stickers or buttons endorsing political candidates. 413 U.S. at 606. The Court concluded that that the law was not substantially overbroad because only a relatively minor amount of protected expression was banned. Id. at 615. The Oklahoma law was specific and finite in its prohibition.

Alternatively, however, the CPPA defines child pornography as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means . . . ." 18 U.S.C. § 2256(8). The phrase "computer or computer generated" visual depiction is overbroad because it encompasses expression that is constitutionally protected. First, it could be interpreted to apply to written materials in addition to visual images. Dictionary definitions for "depict" include to characterize, describe, render, or represent. The Concise Oxford Dictionary of Current English (R.E. Allen ed., 8th ed, Oxford U. Press 1992). Second, it could be

interpreted to apply to visual images, such as cartoons and other drawings, whose production does not involve the use of real children. Thus, the CPPA would criminalize written materials and images that are not produced with real minors -- both categories of expression that retain First Amendment protection.

In Ferber, this Court held that child pornography is not protected by the First Amendment because of the compelling government interest in preventing the "sexual exploitation and abuse of children." 458 U.S. at 757. The need to protect children from sexual exploitation and abuse is at the core of legitimate governmental regulation in this area. However, this Court in Ferber recognized the dangers of censorship where definitions of child pornography are not strictly limited to visual depictions of children engaged in actual sexual conduct. Id. at 764. This Court noted that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retain First Amendment protection." Id. at 764-65.

To now hold that persons who create such constitutionally protected forms of speech are now subject to criminal prosecution would not only destroy the foundations of the First Amendment, but it would contradict the holding and substance of Ferber. The lesson of Ferber is that where a child has not been sexually abused or exploited, there can be no basis for criminalizing a depiction of the child engaged in sexual conduct. 458 U.S. at 764-65. Accordingly, a law that is not limited to depiction of actual sexual conduct would be unconstitutionally overbroad because it criminalizes an intolerable range of constitutionally protected conduct. Osborne v. Ohio, 495 U.S. 103, 111 (1990).

In Houston v. Hill, 482 U.S. 451, 460 (1987), this Court decided that a Houston ordinance making it a crime to "assault, strike, or in any manner oppose, molest, abuse, or

interrupt any policeman in the execution of his duty" was substantially overbroad and thus facially invalid. This Court held that the law granted police "unfettered discretion to arrest individuals for words or conduct that annoy or offend them." Hill, 482 U.S. at 460. Hill simply shouted to a police officer that was arresting his friend, "Why don't you pick on someone your own size?" Id. at 454. By allowing such arbitrary prosecution, the law gave police a censorship function by arresting the speaker who dares criticize perceived law enforcement. Id. at 462.

Here, because the CPPA is so overbroad, police would have unregulated discretion in arresting individuals because the language of the law would certainly include behavior that the police would find to violate the Act..

Further, what Congress claims to be a precise and limited understanding of the "appears to be standard" is not realistic. The Senate stated that the "appears to be" standard extends the prohibition against child pornography from "photographic depictions of actual minors engaging in sexually explicit conduct to the identical type of depiction, one which is virtually indistinguishable from the banned photographic depiction . . . ." (J.A. 44.) First, the term "appears to be" is not equivalent to the terms "identical type" and "indistinguishable." The former allows for subjective and arbitrary application while the latter is an objective standard. Again, if the legislative intent was to prohibit material that was identical in type to actual child pornography that used actual children, it would have used that language. The failure to use this language incorrectly permits a substantial amount of non-obscene material to be prohibited. This inclusion of constitutionally protected activity makes the Act overbroad. Broadrick, 413 U.S. at 612.

III. THE NINTH CIRCUIT PROPERLY HELD THAT THE CPPA IS UNCONSTITUTIONAL BECAUSE IT IS VAGUE.

The Due Process clause of the Fifth Amendment of the Constitution guarantees adequate notice of proscribed conduct so that ordinary persons are not required to guess at a law's meaning, but rather, can know what conduct is forbidden and act accordingly. U.S. Const. amend. V. A law is void on its face if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). Vagueness may invalidate a criminal law for either of two independent reasons: first, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). Second, as in the case of it being overly broad, it may authorize and even encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357-58 (1983). The CPPA fails under a vagueness analysis for both reasons.

Chicago v. Morales, 527 U.S. 41, 47 (1999) involved an ordinance which required a police officer, on observing a person whom he reasonably believed to be a criminal street gang member loitering in any public place with one or more other persons, to order all such persons to disperse, and made failure to obey such an order a violation. This Court in Morales held that the ordinance was unconstitutionally vague in failing to provide fair notice of prohibited conduct and was also impermissibly vague in failing to establish minimal guidelines for enforcement. Morales, 527 U.S. at 63.

Likewise, this Court held that a Massachusetts law making it a crime to "publicly mutilate, trample upon, deface or treat contemptuously the flag of the United States" was void for vagueness. Smith v. Goguen, 415 U.S. 566, 567-68 (1973). This Court affirmed the First Circuit Court's finding that the statute failed to define what constituted forbidden treatment of

United States flags. Goguen, 415 U.S. at 572-73. This Court also held that the law subjected individuals to criminal liability under a standard so indefinite that authorities were free to react to nothing more than their own preferences for treatment of the flag. Id.

Similarly to the vague ordinance in Morales and the vague statute in Goguen, the CPPA does not provide adequate notice of prohibited conduct or establish minimal guidelines for police to enforce. The CPPA's definition of child pornography extends to drawings or images that "appear" to be minors or visual depictions that "convey" the impression that a minor is engaging in sexually explicit conduct, whether an actual minor is involved or not. 18 U.S.C. § 2256(8)(B), (D). The two phrases are highly subjective. There is no explicit standard as to what the phrases mean. Not only would individuals not have adequate notice to whether or not their expression violates the act, but the police could arbitrarily substitute their own definitions of what expression is in violation of the law. The law would operate to inhibit the exercise of free speech because those who might ordinarily express their constitutionally protected ideas, would avoid expressing themselves altogether. Through its vague terms, the CPPA appoints critical policy matters to law enforcement officers, judges, and even juries for decision on an ad hoc and subjective basis. The arbitrary and discriminatory application of the CPPA holds constitutional principles of due process hostage to unequal standards.

For example, through the CPPA, juries can criminalizes creators of Web sites that display images that are obscene or appeal to prurient interest as judged by "contemporary community standards." See Miller v. California, 413 U.S. 15, 37 (1973). The community-standard approach, drawn from this Court's holding in Miller, demonstrates that what is viewed as prurient in conservative areas might not be in more liberal areas. Id. However, community standards are unworkable in the context of the Internet, whose contents can be viewed worldwide

no matter where the images are created. The risk is real that speech will be measured by the standards of the most restrictive community. The truth is that Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users.

V. THE AFFIRMATIVE DEFENSE PROVIDED IN THE CPPA DOES NOT PREVENT OVERBROAD APPLICATION AND DOES NOT SUPPORT A COMPELLING INTEREST CLAIMED BY CONGRESS.

The government claims that the affirmative defense offered in the CPPA will absolve individuals who are not dealing with material that involves the use of real children. This is not true. The CPPA provides a limited affirmative defense for violations of the Act if:

> (1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;
> (2) each such person was an adult at the time the material was produced; and
> (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2252A(c). It is clear from the language above that the defense is not available unless one can prove that the persons depicted are actual adults. The affirmative defense provides no help for creators and distributors of work that does not involve the use of live persons, such as drawings or cartoons. It would be impossible to prove such a fact when the individuals depicted are not real. Thus, the CPPA fails to protect these types of individuals from prosecution and imprisonment.

Second, the affirmative defense is not available to someone accused of unlawful possession. It would be impossible for a viewer or possessor to show that the material was produced using actual persons engaging in sexually explicit conduct and that each such person was an adult at the time the material was produced. This information would most likely not be available even if the material was not advertised as child pornography. If a finder of fact

believes that the material "appears to be" that of a minor engaging in sexually explicit activity, a possessor or viewer in this situation could not prove otherwise.

Finally, the affirmative defense provided in the CPPA reinforces the notion that the real concern of Congress is protecting actual children. The affirmative defense is comprised of two parts. First, no minors could have been used in the production of the material; and second, the material was not marketed in such a manner as to lead the general public to believe that it did involve the use of actual minors. If both of these conditions are met, then no felony has been committed. This affirmative defense is clearly in line with the rationale of Ferber. 458 U.S. at 764-65. Again, this Court in Ferber was concerned with the welfare of real children and as long as actual children were not exploited in the production of the material and the public is not led to believe the same, then no felony has taken place. Id.

If, however, the government's concern is that this material will be used to further child exploitation, by whetting the appetites of pedophiles, the affirmative defense is nothing but a loophole. If the person looks like a minor, and the viewer of such material has no reason to believe otherwise, how would it whet the appetite any less? Furthermore, how could it be any less effective in luring in a child, who is most certainly unlikely to be aware of the fact that the model must be a legal adult? Congress, in fact, surmised as much when they stated that "the effect is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by computer." (J.A. 40.) In summary, the very fact that Congress provided this affirmative defense supports the notion that harm to real minors in production of sexually explicit material is the real issue at stake. Without providing any type of defense for individuals who express their ideas through forms such as cartoons or for individuals in possession of material produced with adults without the ability to prove such,

Congress has neglected to provide protection for those who they claim are not targeted by the Act. (J.A. 44.)

CONCLUSION

The CPPA is patently unconstitutional under the First and Fifth Amendments of the Constitution. The CPPA is a content-based restriction of speech that is subject to strict scrutiny and is not narrowly tailored to serve a compelling governmental interest. The Government has no compelling interest in banning non-obscene materials that do not depict actual minors. The Government also does not have a compelling interest in banning the dissemination of pornographic images because they may whet the appetites of pedophiles or because the material may be morally or aesthetically repugnant. The CPPA is unconstitutional because it is both overbroad and vague and the affirmative defense provided does not protect individuals from overbroad application and arbitrary enforcement. Respondents respectfully request that this Court AFFIRM the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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